SUPREME COURT, U. S.

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In the Supreme Court of the United States

October Term, 1973

No. 73-750

JOAQUIN G. BLAZ, Director of Revenue and Taxation, Government of Guam,
Petitioner,

vs.

JOHN L. MANNING and CARLYN T. MANNING, Husband and Wife, and GENERAL INSURERS, INC.,
Respondents.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED

The question presented is whether United States citizens having income derived from Guam only between the years 1968 and 1972, inclusive, are to be taxed as non-resident aliens. As applied, the non-resident alien tax is a penalty tax imposing a greater burden on the taxpayer than the tax burden of a United States citizen under the Internal Revenue Code. Non-resident aliens are denied the standard deductions and many other deductions and are allowed

only one exemption. Canadian and Mexican citizens are not so taxed and the net effect of the tax was to allow Guam to tax the United States citizen at a higher rate than the United States taxed a Canadian or Mexican citizen.

Respondents take issue with the statement in petitioner's paragraph entitled "Question Presented" to the effect that all United States citizens would be fully taxable for the years prior to 1973 on worldwide income by Guam. This simply is not so. Even native born Guamanians not resident in Guam have never been taxed by Guam on their worldwide income unless they reside in Guam. At most, the proposition is simply a statement of intention by respondent to try to tax United States citizens in that manner if he is not successful in this litigation. In any event such an attempt would be limited to the years 1968-1972, inclusive.

STATEMENT

From the passage of the Guam Organic Act in 1950 until the decision of *Sayre* vs. *Riddell*, 395 F2d 407 (9th Cir., 1968), Guam did not tax United States citizens not residing in Guam as non-resident aliens. However, the *Sayre* decision referred to certain Internal Revenue rulings cited therein for the proposition that the Internal Revenue Service considered United States citizens not residing in Guam as non-resident aliens to Guam for tax purposes. Thereafter

a penalty tax was imposed by petitioner on all United States citizens, not native-born, who had not resided on Guam for the entire taxable year. The authority of *Sayre* to tax United States citizens as aliens was dicta only since *Sayre* decided only the taxability of non-domestic corporations as foreign corporations.

In *Flores* vs. *Government of Guam*, 444 F2d 284 (9th Cir., 1971), it was pointed out to the Court of Appeals that the revenue rulings relating to individuals were wrong as applied to Guam since §932 of the Internal Revenue Code was manifestly inapplicable or incompatible with the Internal Revenue Code as applied to Guam.

Petitioner in this action did not contest the decision of the Court of Appeals for the Ninth Circuit in the *Flores* case nor was a petition for certiorari filed in that action. Nevertheless, petitioner refused to recognize or follow the *Flores* decision and it became necessary to litigate further cases involving the non-resident alien question among which are the instant cases.

ARGUMENTS AGAINST GRANTING THE WRIT

I.

PETITIONER'S ARGUMENT IS BASED PRIMARILY UPON CONSIDERATIONS OF ECONOMIC AND ADMINISTRATIVE DIFFICULTIES

Economics and administrative difficulties are improper arguments. To illustrate, one simply need ask

how far an individual taxpayer would get on an appeal by pleading that he couldn't afford to pay the tax. These issues were not raised at the trial level and were not argued seriously at the appellate level until the petition for a rehearing. Petitioner's petition is full of evidentiary matter not introduced at the trial and not in the record pertaining to economic and administrative hardship. Such evidentiary matter should be disregarded in fairness to respondents.

II.

INTERNAL REVENUE CODE §932 IS INAPPLICABLE TO GUAM

Petitioner argues that §932 of the Internal Revenue Code should be applicable to Guam but even if it isn't, the petitioner can tax United States citizens as non-resident aliens. No authority under the Internal Revenue Code is cited for that proposition.

The argument of petitioner would attempt to classify collectively naturalized Guamanians as non-resident aliens to the United States and United States citizens as non-resident aliens to Guam for tax purposes without the use of §932(a). This is not possible since without §932, no one residing in territory under the jurisdiction of the United States can be classified as an alien. It has been true for many years that the inhabitants of territory acquired by conquest and treaty *are not aliens. Gonzales* vs. *Williams*, 192 U.S. 1, 48 L.Ed. 317, 24 S.Ct. 177. Thus, without §932, no Guamanian, whether collectively or individually

naturalized, nor anyone else who is a United States citizen can be clasified as alien for tax purposes or otherwise. Section 932 and its predecessor statutes were enacted for the express purpose of classifying United States nationals of territories and possessions (not aliens, but also not "otherwise U.S. citizens") as aliens for tax purposes only. No such classification even of nationals is possible without §932.

III.

THE NEW LEGISLATION IS IN ACCORD WITH PETITIONER'S PRE-1968 CONDUCT AND WITH THE COURT OF APPEALS DECISION

From 1950 to 1968 the petitioner did not attempt to tax United States citizens as non-resident aliens to Guam. Beginning with the *Sayre* case in 1968 and using as authority the dicta relating to Internal Revenue rulings as they applied to individuals, the petitioner began taxing non-resident United States citizens as non-resident aliens.

In October, 1972, Congress passed legislation whereby United States citizens with Guam income file only one return depending on their residence at the end of the year. (I.R.C. §935) Thus the only tax years affected by the Court of Appeals decision in the instant case are 1968 through 1972. A reversal would result in a penalty tax applying to United States citizens for 1968 through 1972 but not for the years 1950 through 1967 and 1973 and subsequently. A uniform treatment of all taxpayers there-

fore can only be achieved by a denial of this petition for certiorari or a subsequent affirmance of the Court of Appeals for the Ninth Circuit.

IV.

GUAM LOSES NO REVENUE TO WHICH IT IS ENTITLED

The Government of Guam loses no revenue by this decision except whatever it may have collected in addition to the ordinary tax imposed by the application of a penalty tax against United States citizens with Guam income who were not resident in Guam for an entire taxable year. Actually, it is too late for some of those penalized by the alien tax to file for refunds and many others will not file claims. Guam will therefore profit by keeping such funds.

V.

CONCLUSION

The decisions of the Court of Appeals in *Flores* and the instant case were fair and correct and the petition for writ of certiorari should therefore be denied.

Respectfully submitted,

Dated: December 4, 1973.

BARRETT, FERENZ, BRAMHALL,
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By: W. SCOTT BARRETT
Counsel for Respondents

PROOF OF SERVICE

I, W. Scott Barrett, one of the attorneys for Repondents, hereby certify that on this day I served copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United State Court of Appeals for the Ninth Circuit, as follows:

Three copies upon Martin Kalb, Arent, Fox, Kintner, Plotkin & Kahn, Federal Bar Building, 1815 H Street, N.W., Washington, D. C. 20006; Keith L. Andrews, Attorney General, Government of Guam, Post Office Box DA, Agana, Guam 96910.

All said copies were deposited in the United States mail at Oakland, California, with first class air mail postage prepaid, addressed as above, this 7th day of December, 1973.

Dated this 7th day of December, 1973.

W. SCOTT BARRETT